SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 349

GUY T. HELVERNG, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

AMERICAN CHICLE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings before U.S. Board of Tax Appeals	1	1
Docket entries	1	1
Petition	4	2
Exhibit "A"—Notice of deficiency	9	5
Answer	12	6
Amendment to answer	14	7
Findings of fact and opinion, McMahon, M	19	10
Decision	30	16
Petition for rehearing	31	16
Notice of filing and hearing motion	33	17
Order reversing and modifying opinion	34	18
Decision	36	19
Motion for reconsideration and modification of decision	37	19
Order denying motion for reconsideration, etc	40	21
Memorandum, McMahon, M	42	22
Petition for review and assignments of error	44	23
Notice of filing petition for review	51	27
Praecipe for record	53	27
Clerk's certificate [omitted in printing]	55	28
Proceedings in U.S.C.C.A., Second Circuit	56	28
Opinion, per curiam	56	28
Judgment	58	30
Clerk's certificate [omitted in printing]	60	30
Order allowing certiorari	61	30

1 Before United States Board of Tax Appeals

Docket Number 29897

AMERICAN CHICLE CO., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket entries

Appearances:

For Taxpayer: PAUL L. PEYTON, Esq.

For Commissioner: B. M. COON, F. B. SCHLOSSER, Esq.

1927

July 23—Petition received and filed. Taxpayer notified. Fee paid.

" 25—Copy served on General Counsel.

Sept. 21—Answer filed by G.C.

" 23—Copy of answer served on taxpayer. Gen. Cal.

1929

Oct. 3—Hearing set 12-3-29.

Dec. 3—Hearing held before Stephen J. McMahon, div. 16, on merits, stipulations as to facts and amendment to answer filed. Briefs due Jan. 6, 1930.

2 Dec. 20—Transcript of hearing of Dec. 3, 1929 filed.

" 28—Brief filed by taxpayer.

1930

Jan. 4—Brief filed by G.C.

1931

May 14—Findings of fact and opinion rendered, S. J. McMahon, div. 16, judgment will be entered under rule 50.

July 10—Notice of settlement filed by G.C.

" 14—Hearing set Aug. 5, 1931, on rule 50.

" 22—Consent to settlement filed by taxpayer.

" 29—Decision entered, Charles P. Smith, div. 5.

Dec. 8—Petition for rehearing filed by G.C.

" 9—Hearing set Dec. 16, 1931, on motion.

" 16—Hearing had before S. J. McMahon, div. 16, on respondent's motion for rehearing, C.A.V. Briefs due 15 days from date.

" 29—Transcript of hearing of 12/16/31 filed.

" 30—Memorandum in opposition to motion for rehearing filed by taxpayer.

" 31—Brief filed by G.C.

1932

Jan. 26—Order that opinion promulgated May 14, 1931 be reversed and modified; that decision entered July 29, 1931, be vacated; that respondent's petition for rehearing be denied in certain particulars; and that proceeding be restored to day cal. of Feb. 17, 1932, by which date parties shall file recomputations as per this order entered.

3 Feb. 10—Notice of settlement filed by taxpayer, 2/11/32. Copy served on G.C.
Feb. 17—Hearing had before Mr. Marquette on settlement under rule 50. Not contested. Referred to Mr. McMahon for decision.
" 23—Decision entered, S. J. McMahon, div. 16.
Mar. 10—Motion for reconsideration and modification of decision filed by G.C.
July 12—Order denying motion of Mar. 10, 1932, entered.
Aug. 19—Petition for review by U.S. Cir. Ct. of App. (2nd) with assignments of error filed by G.C.
" 25—Proof of service filed.
Oct. 17—Motion for extension to Nov. 30, 1932, to complete and transmit record filed by G.C.
" 17—Order for extension to Nov. 30, 1932, to prepare evidence and record entered.
Nov. 21—Praecipe filed—proof of service thereon.
" 30—Order enlarging time to Jan. 16, 1932, for transmission and delivery of record sup petition for review, entered.

4 Before United States Board of Tax Appeals

[Title omitted.]

Petition

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:CR:E—60D—E.F.C., dated May 26, 1927, and as a basis for its proceeding alleges as follows:

1. The petitioner is a corporation organized and existing under the laws of the State of New Jersey, with principal office at Thomson Avenue & Manly Street, Long Island City, New York.

2. The notice of deficiency (a copy of which with schedules is attached and marked "Exhibit A") was mailed to the petitioner on May 26, 1927.

3. The amount of deficiency is $26,094.07 covering income tax asserted for the years 1924 and 1925 and the amount thereof in controversy is $9,721.79.

4. The determination of the tax set forth in said notice of deficiency is based upon the following error:

"(a) The Commissioner has included in taxable income for each year in dispute the difference between the maturity value
5 (par value) and the price paid by the taxpayer in the open market for certain of its own bonds and notes."

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) In the year 1909 the Sen Sen Chiclet Company, a Maine corporation, issued $2,700,000 face value of bonds maturing May 14, 1929, with a sinking-fund clause providing that a deposit be made with

the trustee of at least $50,000 per year, to provide for the purchase of bonds submitted to the trustee in open bid by bondholders under the terms of the indenture.

(b) In August 1914 petitioner acquired all of the assets of said Sen Sen Chiclet Company and assumed the payment of the liabilities of said company, among which were $2,425,000 par value of said bonds then outstanding and unredeemed.

(c) Due to expansion of petitioner's business, petitioner on October 1, 1919, issued $2,500,000 par value of its 6% notes maturing serially October 1, 1920 to 1927, inclusive.

(d) In October 1922 such serial notes remaining unredeemed at that time in par value of $1,710,000 were refunded by the issuance of petitioner's five-year notes maturing October 1, 1927, in the same amount of $1,710,000.

(e) Petitioner duly filed its income-tax return for the year 1922, which showed a net loss for the calendar year 1922 of $840,376.76. In the computation of this net loss there was included
6 $16,767.50 of income and the Commissioner added further income in the amount of $9,581.56, making a total of $26,349.06, based on the following facts:

(f) During said year 1922 petitioner purchased from the public $82,000 par value of said Sen Sen Chiclet Company bonds and paid therefor $55,650.94.

(g) The Commissioner, in arriving at the deficiency for 1924, reduced said net loss for 1922 on account of certain items to which petitioner does not object. However, petitioner claims that said net loss for 1922 should, on the other hand, be increased by the elimination of $26,349.06 of supposed profit on said 1922 bond purchases and the Commissioner has refused to eliminate said supposed profit.

(h) Petitioner duly filed its income-tax return for 1924 and included therein as taxable income $35,457.45, computed upon the following facts:

(i) During said year 1924 petitioner purchased from the public $15,000 par value of Sen Sen Chiclet Company bonds and paid therefor $11,391.00, and also purchased from the public during said year $769,500 par value of said five-year six percent notes and paid therefor $745,440.45, and the trustee of said sinking fund also purchased from the public in said year $44,000 par value of said Sen Sen Chiclet Company bonds and paid therefor $36,211.10. Petitioner claims that said sum of $35,457.45, representing the difference between the par value and the amounts paid for said bonds and
7 notes does not constitute taxable income to petitioner and should be eliminated from its 1924 tax return in arriving at any deficiency for said year 1924, but the Commissioner has refused to do so.

(j) Petitioner duly filed its income-tax return for the calendar year 1925 and included therein as taxable profit $15,353.69, based on the following transactions:

(k) During said year petitioner purchased $166,500 par value of Sen Sen Chiclet Company bonds from the public and paid therefor $152,016.81; and the trustee of said sinking fund likewise purchased from the public $35,000 par value of said bonds and paid therefor $34,129.50. Petitioner claims that said sum of $15,353.69 reported as profit in its 1925 tax return should be eliminated in computing any tax deficiency for said year 1925, but the Commissioner has refused to do so.

(l) For several years, beginning with the year 1920, petitioner suffered so greatly from business reverses that large blocks of said bonds and notes were thrown on the market at prices considerably below par. At these low prices the petitioner went into the market and purchased such bonds and notes as it could.

(m) The Commissioner claims that inasmuch as these bonds were issued many years ago at their face value the petitioner derived an income in said years from the purchase of these bonds equal
8 to the difference between the issue price and the purchase price.

Petitioner contends that it derived no taxable income from the purchase of its own bonds at less than the issue price for the reason that it simply used a portion of its cash on hand to pay a portion of its debts.

6. The petitioner prays for relief from the deficiency asserted by the respondent on the following grounds:

(a) That the facts herein set forth are governed by the principle laid down by the United States Supreme Court in the case of Bowers v. Kerbaugh-Empire Co., decided May 3, 1926, and reported in 271 U.S., and that such alleged income does not constitute taxable income.

(b) That such alleged profit is not taxable income within the meaning of the law is also shown by the decision of the United States Board of Tax Appeals in the case of Independent Brewing Company of Pittsburgh, Docket No. 3242, September 18, 1926, in which the Board decided that bonds issued by petitioner and purchased in the open market by them at a cost less than face value did not result in taxable income.

Wherefore petitioner prays that this Board may redetermine the deficiency herein alleged.

AMERICAN CHICLE COMPANY,
Petitioner.

Per A. A. MASTERSON,
A. A. MASTERSON, *Treasurer.*

[Verified by A. A. Masterson on July 22, 1927.]

Exhibit "A" to petition

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, May 26, 1927.

IT:CR:E—60D
EFC

AMERICAN CHICLE COMPANY,
Thomson Avenue & Manly Street,
Long Island City, New York.

SIRS: An examination of your income-tax returns in connection with a revenue agent's recommendations, discloses no change in tax liability for 1922 and 1923 and additional taxes aggregating $26,094.07 for 1924 and 1925, as shown on the attached statement and explained in Bureau letter dated May 17, 1927.

In accordance with the provisions of section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D.C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the collector of internal revenue. No claim for abatement can be ascertained.

If you asquiesce in this deteremination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed form A, and forward it to the Commissioner of Internal Revenue, Washington, D.C., for the attention of IT:CR:E—60D, EFC. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner.
By C. R. NASH,
Assistant to the Commissioner.

Inclosures:
Statement.
Form A.
Form 882.

11 *Statement—year examined and forms filed*

	Years	Forms
Company:		
American Chicle Company, Long Island City, New York	1922	1120
	1923	1120
	1924	1120
	1925 (3)	1120
Subsidiary:		
Sen Sen Chiclet Company, Long Island City, New York	1922	None
	1923	None
	1924	None
	1925	None

Tax liability

	Years	Additional tax
American Chicle Company, Long Island City, New York	1922	None
	1923	None
	1924	$19,419.17
	1925	6,674.90
Aggregate additional tax		26,094.07

The revenue agent's report dated December 22, 1926, a copy of which was furnished you, has been accepted as submitted as explained in Bureau letter dated May 17, 1927.

In determining the above-stated results due consideration has been given the statements made in your letter dated May 19, 1927, and accompanying brief dated March 28, 1927, but the Bureau is unable to concede your requests for the reason that the Commissioner has not acquiesced in the decisions upon which you have based your protest.

12 Before United States Board of Tax Appeals

[Title omitted.]

Answer

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, general counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Admits the allegations contained in paragraph 2 of the petition.
3. Admits the allegations contained in paragraph 3 of the petition.
4. Denies the Commissioner erred in respect to the matters set forth in paragraph 4 of the petition.
5. (a), (b), (c), (d), (e), and (f) admits the allegations contained in subdivisions (a), (b), (c), (d), (e), and (f) of paragraph 5 of the petition.

5. (g) Admits the allegations contained in subdivision (g) of paragraph 5 of the petition, but denies the refusal to eliminate from profits for 1922 the sum of $26,349.06 is erroneous.

5. (h) Admits the allegations contained in subdivision (h) of paragraph 5 of the petition.

13 5. (i) Admits the allegations contained in subdivision (i) of paragraph 5 of the petition, but denies that the refusal to eliminate from 1924 income the said sum of $35,457.45 is erroneous.

5. (j) Admits the allegations contained in subdivision (j) of paragraph 5 of the petition.

5. (k) Admits the allegations contained in subdivision (k) of paragraph 5 of the petition, but denies the refusal to eliminate from 1925 income the sum of $15,353.69 is erroneous.

5. (l) Denies the allegations contained in subdivision (l) of paragraph 5 of the petition.

5. (m) Admits the allegations contained in subdivision (m) of paragraph 5 of the petition, but denies the contention of the petition is correct.

Denies each and every other allegation contained in the petition of the above-named taxpayer not hereinbefore expressly admitted, qualified or denied.

Wherefore, it is prayed that the appeal be denied.

A. W. GREGG,
General Counsel,
Bureau of Internal Revenue.

Of counsel:
SHELBY S. FAULKNER,
Special Attorney,
Bureau of Internal Revenue.

14 Before United States Board of Tax Appeals

[Title omitted.]

Amendment to Answer

The Commissioner of Internal Revenue by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, for further answer to the petition of the above-named taxpayer adds to the answer heretofore filed the following:

6. (a) The petitioner reported on its original income-tax return filed for the year 1923 a profit in the amount of $12,428.42 on the purchase and retirement of American Chicle Company 6% five-year notes in the sum of $256,500.00, which cost $244,071.58.

(b) That the discount on said American Chicle Company 6% notes (referred to in paragraph 6 (a) from October 1, 1922, to date of maturity October 1, 1927, is $9,496.14, of which $2,374.04 is discounted from date of issuance to date retired and $7,122.10 from date retired to date of maturity.

(c) That the respondent in the audit of the return for the year 1923 as shown in the notice of deficiency dated May 26, 1927, reduced the net income reported as reflected in the profit of $12,428.42 on the purchase of the American Chicle Company 6% notes by the sum of $7,122.10 on account of offsetting said profit by the amount of discount from date of retirement to date of maturity.

(d) That the details of the computation of the said reduction of profit is set forth in schedule "A" attached hereto and made a part of this answer.

7 (a) In 1924 petitioner also purchased from the public $769,500 par value of its said five-year notes and paid therefore $745,440.45, the difference between the par value of said bonds and the redemption price paid being $24,059.55.

(b) The petitioner also reported on its income tax return for the year 1924 a profit in the sum of $24,059.55 on the purchase of the bonds referred to in paragraph 7 (a) supra.

(c) That the discount on the bonds referred to in paragraph 7 (a), supra, from date of issue to date retired is in the amount of $10,287.49 and from date retired to date of maturity $18,200.94 or a total of $28,488.43 from October 1, 1922, to maturity, October 1, 1927.

(d) That the respondent in computing the taxable profit on the purchase of the bonds referred to in paragraph 7 (a) supra reduced the profit of $24,059.55, reported by the petitioner for 1924, by $18,200.94, the unamortized discount from date retired to date of maturity, and included only a net profit of $5,858.61 in the taxable income for the year 1924 as shown in the notice of deficiency dated May 26, 1927.

16 (e) That the details of the above computation of profit are set forth in schedule " B " attached hereto and made a part of this answer.

8. That in computing the deficiency for 1924 the Commissioner applied against the net income for that year, $804,431.77, petitioner's net loss for the calendar year 1922, as determined by the Commissioner in the notice of deficiency dated May 26, 1927, in the sum of $649,077.81, in the computation of which the Commissioner included as income said difference of $26,349.06 arising out of the redemption by petitioner in 1922 of Sen Sen Chiclet Company bonds as aforesaid (par. 5 (e) to (g) of petition and answer).

9. (a) That the petitioner purchased in 1925 $684,000.00 of 6% par value notes for retirement at par which had been issued at a discount of $658,676.55.

(b) That the discount on said notes referred to in paragraph 9 (a) supra from date of issue to date retired was $14,349.73 and that the amount of unamortized discount at the time of retirement was $10,973.72.

(c) That the respondent in the audit of the return for 1925 as filed by the petitioner allowed as a deduction a loss in the amount of $10,973.72 due to the purchase and retirment of said note referred to

in paragraph 9 (a) supra and reduced taxable income for 1925 as shown in the notice of deficiency dated May 26, 1927, by said amount.

(d) That the details of the said computation of loss of $10,973.72 as set forth in schedule "C" attached hereto and made a part of this answer.

17 10. (a) That the petitioner also purchased in 1925 for retirement $275,500.00 debentures at par which had been issued at a discount of $232,950.00.

(b) That the discount on the said debentures referred to in paragraph 10 (a) supra to date retired was $25,833.93 and that the unamortized discount was $16,716.07.

(c) That the respondent in the audit of the return for 1925, as filed by petitioner, allowed as a deduction a loss in the amount of $16,716.07 due to the purchase and retirement of the debentures referred to in paragraph 10 (a) supra and reduced taxable income for 1925 as shown in the notice of deficiency dated May 26, 1927, by said amount.

(d) That the details of the said computation of loss of $16,716.07 are set forth in schedule "D" attached hereto and made a part of this answer.

11. That the petitioner's books of account and records for 1921 to 1925, inclusive, were kept on the accrual basis of accounting and its returns for the years 1921 to 1925 were filed on the same basis.

12. That if the Board finds that the Commissioner erred in respect of the assignments of error set forth in the petition (par. 4 (a)) in respect of the inclusion in taxable income for each year in dispute the difference between the maturity value (par value) and the price paid by the taxpayer in the open market for certain of its own bonds and notes, it is then affirmatively alleged that the allowance of said items of discount of $7,122.10 in 1923, referred to in paragraph 6 (c) above, $18,200.94 in 1924 referred to in paragraph

18 7 (d) above, and $10,973.72 in 1925, referred to in paragraph 9 (c) above, and $16,716.07 referred to in paragraph 10 (c) above, were erroneously allowed as a reduction and offset to the profit originally reported by the petitioner and adjusted by the respondent.

13. That the taxable income for 1923 should be further adjusted by $7,122.10, for 1924 by $18,200.94, and for 1925 by $10,973.72 plus $16,716.07 and the deficiencies proposed should be adjusted accordingly.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
BYRON M. COON,
Special Attorney,
Bureau of Internal Revenue.

19 23 B.T.A. ——

United States Board of Tax Appeals

Docket No. 29897

AMERICAN CHICLE COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Findings of fact and opinion

Promulgated May 14, 1931

A corporate taxpayer which assumes the bonded indebtedness of a predecessor in business, as part consideration for its predecessor's assets and business, realizes no taxable gain from the purchase, for retirement, of its predecessor's bonds, at a price less than the face or par value of such obligations. Any and all sums paid by the petitioner for the retirement of such obligations represent payments on the purchase price of the assets and business.

A corporate taxpayer, keeping its books on an accrual basis, which has issued its own notes for a price less than their face or par value, and, during the taxable year, purchases, for retirement, a part or all of such obligations, at less than the issuing price, or the issuing price plus the total deductions for amortization, of discount allowable to the date of such purchase, is not entitled, in computing net income for the taxable year, to deduct the unamortized discount which would have been deductible in a period subsequent to
20 the date of purchase, had the notes continued to remain outstanding to the date of maturity and then had been retired at face or par value.

A corporate taxpayer, keeping its books on accrual basis, which has issued its own notes for a price less than their face or par value, and, during the taxable year, purchases, for retirement, a part or all of such obligations, at a price in excess of the issuing price plus the total deductions for amortization of discount allowable to the date of purchase, is entitled, in computing net income for the taxable year, to deduct, as an expense, the excess of the purchase price over the issuing price plus the total deductions for amortization of discount allowable to the date of purchase.

P. L. PEYTON, ESQ.,
For the Petitioner.

BYRON M. COON, ESQ.,
For the Respondent.

In this proceeding the petitioner seeks a redetermination of deficiencies in income tax, asserted by the respondent for 1924 and 1925, in the amounts of $19,419.17 and $6,674.90, respectively. The sole issue

raised in the petitioner is that the respondent erred in including in income for 1922, 1923, 1924, and 1925, as taxable gains the excess of the face or par value of certain bonds and notes, purchased for retirement in several transactions during those taxable years, over the purchase price thereof. In an amended answer, the respondent affirmatively alleges that should the Board find he erred as charged in the petition, then, he also erred in allowing as deductions for 1923, 1924, and 1925, the sums of $7,122.10, $18,200.94, and $27,689.79, respectively, for unamortized discount on the notes purchased for the retirement in those years. The case was submitted for decision on a written stipulation of facts.

21 *Findings of fact*

Petitioner is a corporation organized and existing under the laws of the State of New Jersey and has its principal office at Thomson Avenue and Manly Street, Long Island City, New York.

In 1909 the Sen Sen Chiclet Company, a Maine corporation, issued $2,700,000 face value of bonds, maturing May 14, 1929, with a sinking fund clause providing that a deposit be made with the trustee of at least $50,000 per year to provide for the purchase of bonds submitted to the trustee in open bid by bondholders under the terms of the indenture.

In August 1914 petitioner acquired all of the assets of the Sen Sen Chiclet Company and assumed the payment of its liabilities, among which were $2,425,000 par value of bonds then outstanding and unredeemed.

In 1922 petitioner purchased from the public $82,000 par value of Sen Sen Chiclet Company bonds and paid therefor $55,650.94, making a difference of $26,349.06 between the par value and the redemption price paid. The respondent, in making his determination of petitioner's net loss for the calendar year 1922, included as taxable income to petitioner for that year the difference between the par value and the redemption price paid, or $26,349.06. The petitioner reported only $16,767.50 of the $26,349.06 on the original return filed for 1922. The respondent increased this amount by $9,591.56.

On October 1, 1919, petitioner issued $2,500,000 par value of its 6 percent notes maturing serially October 1, 1920, to 1927, inclusive.

22 In October 1922 such serial notes remaining unredeemed at that time, of $1,710,000 par value, were refunded by the issuance of petitioner's five-year notes maturing October 1, 1927, in the same amount, towit: $1,710,000 par value.

The petitioner reported, on its original income-tax return filed for the year 1923, as a profit the amount of $12,428.42 on the purchase and retirement of $256,500 face value of its six percent five-year notes which were purchased for $244,071.58. The discount on these American Chicle Company six percent notes, from October 1, 1922, to date of maturity, October 1, 1927, is $9,496.14, of which $2,374.04 is discount from date of issue to date retired, and $7,122.10 is discount

from date retired to date of maturity. The respondent, in the audit of the return for the year 1923, as shown in the notice of deficiency dated May 26, 1927, reduced the amount of $12,428.42 returned as a profit on the purchase of the American Chicle Company six percent notes, by the sum of $7,122.10, the amount of discount from date of retirement to date of maturity, and determined a profit of $5,306.32.

The petitioner also reported on its original return filed for the year 1923, as a profit, the sum of $14,259.42 on the purchase of Sen Sen Chicle Company 6% bonds of a par value of $62,500 which were purchased for $48,240.58. The amount of $14,259.42 was included in income by the respondent in his determination for the year 1923.

The petitioner's net income for the calendar year 1923, as determined by the respondent in the notice of deficiency dated May 26, 1927, was $177,432.69, and the respondent applied under section 204 of the Revenue Act of 1921 against petitioner's 1923 net income, $3,917,760.86 of the net loss for 1921, as determined by him in a prior audit.

23 In 1924, petitioner purchased from the public, $15,000 par value of Sen Sen Chiclet Company bonds and paid therefor $11,391 and the trustee of the sinking fund also purchased from the public in the year 1924, $44,000 par value of the Sen Sen Chiclet Company bonds, paying therefor $36,211.10, the difference between the par value of such bonds and the redemption prices paid being the amount of $11,397.90. The petitioner reported, on its income-tax return filed for the year 1924, as a profit, the amount of $11,397.90 on the purchase of the Sen Sen Chiclet Company 6% bonds. The respondent, in the audit of this return, as shown in the deficiency notice dated May 26, 1927, included the amount of $11,397.90 in the taxable income for 1924.

In 1924 petitioner also purchased from the public $769,500 par value of its five-year notes and paid therefor the sum of $745,440.45, the difference between the par value of said notes and the redemption price paid being $24,059.55. The petitioner also reported this amount as profit in its return for the year 1924. The discount on these notes from date of issue to date retired is in the amount of $10,287.49, and from date retired to date of maturity $18,200.94; or a total of $28,488.43 from October 1, 1922, to maturity, October 1, 1927. The respondent, in computing the taxable profit on the purchase of these notes, reduced the amount of $24,059.55 reported by petitioner as a profit for 1924, by the sum of $18,200.04, the unamortized discount from date retired to date of maturity, and included only a net amount of $5,858.61 in the taxable income for the year 1924, as shown in the deficiency notice dated May 26, 1927.

In computing the deficiency for 1924, the respondent ap-
24 plied against the net income of $804,431.17 for that year petitioner's net loss for the calendar year 1922, as determined by the respondent, in the deficiency notice dated May 26, 1927, in the sum of $649,077.81. In the computation of said net loss for

1922 the respondent included as income said difference of $26,349.06 arising out of redemption by petitioner in 1922 of Sen Sen Chiclet Company bonds.

Petitioner, in 1925, purchased $166,500 par value of Sen Sen Chiclet Company bonds from the public and paid therefor $152,016.81, and the trustee of the sinking fund likewise purchased from the public $35,000 par value of Sen Sen Chiclet Company bonds and paid therefor $34,129.50, the difference between the par value of the bonds and the redemption prices paid therefor being $15,353.69. The petitioner reported on its income tax return filed for the year 1925, as a profit on the purchase of these bonds, the amount of $15,353.69, which the respondent included as income in his determination for the year 1925.

In 1925 the petitioner purchased at par for retirement $684,000 of its 6% notes which had been issued at a discount for $658,676.55. The discount on these notes from date of issue to date retired was $14,349.73, and the amount of unamortized discount at the date retired was $10 973.72. The respondent, in his determination of deficiency, allowed as a deduction from income a loss in the amount of $10,973.72 due to the purchase and retirement of these notes.

The petitioner also purchased in 1925, for reirement, $275,500 debentures at par which had been issued at a discount for $232,950.
The discount on these debentures to date of retirement was
25 $25,833.93, and the unamortized discount was $16,716,07. The respondent, in his determination of the deficiency for 1925, allowed as a deduction a loss in the amount of $16,716.07 due to the purchase and retirement of those debentures.

The petitioner's books of account and records for 1921 to 1925, inclusive, are kept on the accrual basis of accounting and its returns for those years were filed on the same basis.

Opinion

McMAHON: The tax liabilities of the petitioner for the years 1921, 1922, and 1923 are not before us for redetermination, but we are concerned with any net losses sustained by the petitioner in those years insofar as they effect the petitioner's tax liability for the year 1924. Since the net loss for 1921 exceeds the net income for 1923 and the petitioner sustained a net loss for 1922, the adjudication of the issues as they relate to 1923 would not change the amount of the net loss for 1922 which the petitioner is entitled to deduct, under section 206 (e) of the Revenue Act of 1924, in computing net income for 1924. We will, therefore, not consider the issues insofar as they relate to the year 1923.

The respondent has charged the petitioner with income in 1922, 1924, and 1925 in the amounts of $26,849.06, $11,397.90, and $15,353.69, representing, in each instance, the amount by which the face or par value of the Sen Sen Chiclet Company 6% bonds, purchased for

retirement during the year, exceeded the purchase price paid by the petitioner. The bonds in question were a part of the bonds of the Sen Sen Chiclet Co. outstanding at the date of the purchase of that company's assets by the petitioner, payment of which was assumed by the petitioner as part of the purchase price of those
26 assets. Potentially, the liability created by the petitioner in assuming the payment of these bonds was equal to their aggregate face or par value, but its actual liability to the Sen Sen Chiclet Co. was not for any specific sum, but, rather, one which could be satisfied by whatever amount the petitioner might be required to pay in acquiring the bonds for retirement. There is not here, therefore, in fact, as both parties have assumed, a matter of the petitioner's satisfaction of an obligation for less than the full amount or face value thereof. The payments involved in the transactions under consideration were payments on the purchase price of the Sen Sen Chiclet Company's assets, paid, under the conditions of the agreement, to the holders of that company's bonds. When all of the bonds have been retired by the petitioner its obligation to the Sen Sen Chiclet Company will have been satisfied in full, and whatever the total amount paid to retire the bonds, it will constitute a part of the cost to petitioner of the Sen Sen Chiclet Co. assets. Accordingly, we hold that the petitioner derived no income in 1922, 1924, and 1925 from the purchase of the Sen Sen Chiclet Co. bonds, for retirement, at a price less than the face or par value of such bonds, and that the respondent erred in including in income for those years the items of $26,349.06, $11,397.90 and $15,353.69, respectively. See New York, Chicago & St. Louis Railroad Co., 23 B.T.A.—

The petitioner further complains against the respondent's action in charging it with income in 1924 in the amount of $24,059.56, representing the amount by which the face or par value of the petitioner's notes purchased for retirement during the year ex-
27 ceeded the purchase price paid by the petitioner. Against this item of $24,059.55 the respondent allowed an offset of $18,200.94, representing the so-called "unamortized discount" on these notes at the date of purchase and retirement, so that the net amount which the respondent has included in income is $5,858.61. The respondent denies the error charged in the complaint, and counters with an affirmative allegation that if the petitioner prevails as to the item of $24,059.55, the offsetting item of $18,200.94 should to eliminate from the computation of net income, and, further, that he erred in allowing a deduction for 1926 of $27,689.79 for unamortized discount on the notes and debentures purchased for retirement in that year. We understand that wherever the term "discount" has been used in the stipulation of facts the parties used the term to mean the difference between the issuing price of the petitioner's obligations, for cash, and the face or par value thereof, which brings it within the definition of "discount" as stated in New York, Chicago & St. Louis Railroad Co., supra.

Following the principle laid down in Bowers v. Kerbaugh-Empire Co., 271 U.S. 170, the Board has repeatedly held, in a long line of cases, that a corporate taxpayer realizes no taxable gain from the purchase of its own bonds at less than the issuing price. See American Tobacco Co., 20 B.T.A. 586, and cases therein cited. The facts of this case require the application of the same rule. However, the item of $18,200.94, which the respondent has allowed as an offset against the alleged gain of $24,059.55, for "unamortized discount" on the notes retired in 1924, should be eliminated from the computation of net income for that year, since it is clear that any
28 such discount was not actually paid upon retirement of the notes. These notes, having a face or par value of $769,500, had been issued for $741,011.57 and were purchased by the petitioner at the price of $745,440.45. Thus, the discount which the petitioner actually paid amounted to only $4,428.88. The discount amortized to the date of purchase, which the petitioner was entitled to take as deductions in returns of prior years, to wit: $10,287.49, was almost twice as great as the discount which the petitioner actually paid. Clearly, under these facts, the petitioner was not entitled to any further allowance in respect of the discount on these notes when they were purchased for retirement in 1924. Accordingly, we hold that the net income for 1924, as determined in the deficiency notice, should be reduced by the sum of $5,858.61.

However, we hold that the respondent correctly allowed a deduction of $27,689.79 for 1925 in connection with the purchase and retirement of certain notes and debentures in that year. These notes and debentures, having an aggregate face or par value of $959,500, had been issued for $891,626.55, and were purchased by the petitioner at par. The amortized discount on these obligations to the date of the purchase, which the petitioner, keeping its books on an accrual basis, was entitled to deduct in its returns amounted to $40,183.66. Article 545 (3) of Regulations 69 provides:

(a) If bonds are issued by a corporation at a discount, the net amount of such discount is deductible and should be prorated or amortized over the life of the bonds. "(b) If thereafter the corporation purchases and retires any of such bonds at a price in excess of the issuing price plus any amount of discount already
29 deducted, the excess of the purchase price over the issuing price plus any amount of discount already deducted (or over the face value minus any discount not yet deducted) is a deductible expense for the taxable year. * * *"

The petitioner purchased and retired the notes and debentures at a price which exceeded, by $27,689.79, the issuing price plus the amortized discount which the petitioner was entitled to deduct in its returns; and under the foregoing provisions of the regulations, which we believe to be a fair and reasonable interpretation of the applicable statute, it was entitled to the deduction of $27,689.79 which the respondent has allowed.

In view of the conclusions reached in this opinion, the net incomes for 1924 and 1925, as determined by the respondent in the deficiency notices, should be reduced by the amounts of $43,605.57 and $15,353.69, respectively.

Reviewed by the Board.

Judgment will be entered under rule 50.

30 Before United States Board of Tax Appeals, Washington

Docket No. 29897

AMERICAN CHICLE COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision entered July 29, 1931

Pursuant to findings of fact and opinion promulgated May 14, 1931, the respondent herein, to wit, on July 10, 1931, having filed a proposed redetermination for the years 1924 and 1925, and the petitioner on July 22, 1931, having filed notice of acquiescence to the said proposed redetermination, it is

Ordered and decided that there is a deficiency for the year 1924 in the amount of $2,275.11; and that there is no deficiency and no overpayment for the year 1925.

Entered.

(Signed) CHARLES P. SMITH,
Member.

Enter Jul. 29, 1931.
vlh

31 Before United States Board of Tax Appeals

[Title omitted.]

Petition for rehearing

Now comes the Commissioner of Internal Revenue, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, and

Moves that the decision of the Board in the above-entitled appeal, promulgated on May 14, 1931 (23 B.T.A. 221), be reconsidered and partly reversed, the final order therein of July 29, 1931, be vacated, and judgment rendered in accordance with the Board's revised decision.

The Board in its decision of May 14, 1931 held—

1. That as a result of the acquisition by the petitioner for retirement of its predecessor's bonds at a price less than the par value of such obligations which had been assumed as a part consideration for its predecessor's assets and business there was no taxable gain.

2. That as a result of its acquisition by the petitioner for retirement of its own notes at a price less than the issuing price, or the issuing price plus the total deductions there was no taxable gain.

32 The facts are fully set forth in the Board's "findings of fact" upon which it based its opinion promulgated May 14, 1931.

In arriving at its conclusion that the amount by which the face or par value of the Sen Sen Chiclet Company's 6% bonds purchased for retirement exceeded the purchase price paid by the petitioner was not taxable gain, and that the amount by which the face or par value of the petitioner's notes purchased for retirement exceeded the purchase price paid by the petitioner was not taxable gain, the Board followed in the wake of its own decisions based upon its interpretation of Bowers v. Kerbaugh-Empire Co., 271 U.S. 170, namely, New York, Chicago and St. Louis Railroad Co., 23 B.T.A. 256 and American Tobacco Company, 20 B.T.A. 586.

However, since the Board decided the instant case, the United States Supreme Court settled the principle herein involved on November 2, 1931, in the case of United States v. Kirby Lumber Co. (C.C.H. 9156; Prent. Hall 2300.93).

In the Kirby Lumber Company case the Supreme Court reversed the Court of Claims' decision (44 Fed. (2d) 885) and held that where a corporation purchases and retires its own bonds at a price less than the issuing or face value, the excess of the issuing price or face value over the purchase price is taxable income for the taxable year. It distinguished the point decided in the Kirby Lumber Company case from that decided in the Kerbaugh-Empire Company case.

Wherefore, the premises considered, it is respectfully prayed that the Board grant this motion, reverse in the respects above set forth

33 the decision promulgated May 14, 1931, vacate its final order of July 29, 1931 entered thereunder, and render judgment for the respondent in accordance with the Board's modified decision without prejudice to the rights of the parties to contest the correctness of the opinion pursuant to the statutes in such cases made and provided.

(Signed) C. M. CHAREST,
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of counsel:
BYRON M. COON,
Special Attorney,
Bureau of Internal Revenue.

Before United States Board of Tax Appeals

[Title omitted.]

Notice of filing and hearing motion

Dec. 9, 1931

Please take notice the respondent has filed a motion in the above-entitled proceeding, a copy of which is inclosed herewith.

34 This motion has been placed on the Day Calendar for hearing before a division of the Board at its Washington office, Constitution Avenue at 12th Street Northwest, at 9:30 a.m. on Dec. 16, 1931.

No further notice of this hearing will be sent.

B. D. GAMBLE, *Clerk.*

To: P. L. PEYTON, Esq.,
15 Broad St., New York, N.Y.

Before United States Board of Tax Appeals

[Title omitted.]

Order reversing and modifying opinion

The Board having promulgated its opinion in the above-entitled proceeding on May 14, 1931, wherein it was held that the petitioner did not realize income in the year 1924 in the amount of $5,858.61 by virtue of the retirement by petitioner of certain of its own notes at less than the issuing price thereof plus the total deductions for amortization of discount allowable to date of retirement, and that the petitioner did not realize income in the years 1922, 1924, and 1925 in the amounts of $26349.06, $11,397.90, and $15,353.69, respec-

35 tively, from the retirement, at less than face or par value, of Sen Sen Chiclet Company 6 percent bonds, payment of which was assumed by the petitioner at the time petitioner obtained the assets of the Sen Sen Chiclet Company; the Board having entered its decision in this proceeding on July 29, 1931, setting forth a deficiency of $2,275.11 for the year 1924 and no deficiency and no overpayment for the year 1925; the respondent having filed, on December 8, 1931, within the six months period provided for by statute for the filing of a petition for review, a petition for rehearing wherein it was moved that the Board reverse such holdings set forth above, respondent relying upon the decision of the United States Supreme Court in United States v. Kirby Lumber Company, ————; hearing having been duly had upon such motion on December 16, 1931, at which time counsel for petitioner conceded that under the decision in United States v. Kirby Lumber Company, supra, petitioner realized a gain of $5,858.61 in 1924 upon the purchase of its own notes and that such

amount is taxable income for that year, but denied that it derived taxable income from the retirement of Sen Sen Chiclet Company bonds; now, therefore, the motion having been duly considered, it is

Ordered: that the opinion of the Board in this proceeding promulgated May 14, 1931, should be and the same hereby is reversed and modified to hold that the amount of $5,858.61 constituted taxable income to the petitioner in the year 1924; that the decision entered in this proceeding on July 29, 1931, be and the same hereby is vacated and set aside; and that the respondent's petition for rehearing
36 in so far as it requests that the Board hold and decide that the above referred to amounts of $26,349.06, $11,397.90, and $15,353.69 constituted income to the petitioner in the years 1922, 1924, and 1925, respectively, be, and the same hereby, is denied. (See New York, Chicago & St. Louis Railroad Co., 23 B.T.A. 177, cited in the opinion promulgated in this proceeding; and Athol Manufacturing Co. v. Commissioner, decided by the United States Circuit Court of Appeals, First Circuit, December 17, 1931); and it is further

Ordered that the proceeding be restored to the day calendar of February 17, 1932, on or before which date the parties shall file recomputations of the deficiencies in accordance herewith.

(Signed) STEPHEN J. MCMAHON,
Member, U.S. Board of Tax Appeals.

Entered Jan. 26, 1932.

Before United States Board of Tax Appeals

Docket No. 29897

AMERICAN CHICLE COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision Entered February 23, 1932

Pursuant to the opinion of the Board promulgated on May 14, 1931, and to the order entered January 26, 1932, in the above-
37 entitled proceeding, counsel for the petitioner having filed a proposed final determination with notice of settlement, and at the hearing under rule 50 had on February 17, 1932, counsel for the respondent having interposed no objection to such proposed final determination, now therefore, it is

Ordered and decided that with respect to the year 1924 there is a deficiency in tax in the amount of $3,007.44, and that with respect to the year 1925 there is no deficiency.

(Signed) STEPHEN J. MCMAHON,
Member U.S. Board of Tax Appeals.

Entered Feb. 23, 1932.

Before United States Board of Tax Appeals

[Title omitted.]

Motion for reconsideration and modification of decision

Now comes the Commissioner of Internal Revenue, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, and

Moves that the order of this Board, entered in this appeal
38 on January 26, 1932, and the decision based thereon, entered on February 23, 1932, be reconsidered and modified insofar as such order and decision deny the respondent's contention that the petitioner received taxable gain or profit as the result of the purchases for retirement of outstanding bonds issued by the Sen Sen Chiclet Company, the predecessor corporation. which obligations the petitioner had assumed and agreed to pay as part consideration for the transfer to it of all of the assets of the said Sen Sen Chiclet Company.

The Board supports its conclusion that the petitioner derived no taxable gain from its purchase and retirement of the Sen Sen Chiclet bonds by citing its decision in the Appeal of the New York, Chicago & St. Louis Railroad Co., 23 B.T.A. 177, and the Appeal of the Athol Manufacturing Co., 22 B.T.A. 105, affirmed by C.C.A., 1st Ct., 54 Fed. (2d) 230.

However, the railroad case, supra, involved the purchase and retirement of bonds issued by the taxpayer, the same as in the Kirby Lumber Co. case, 284 U.S. 1, wherein the Supreme Court decided that a taxable gain resulted. Moreover, the Board has modified its decision in the New York, Chicago & St. Louis Railroad Co. case, supra, by taxing as gain the difference between the issuing price and the recovery price of the bonds after respective counsel therein had agreed that the principle decided in the Kirby Lumber case was applicable.

The Appeal of the Athol Manufacturing Company, supra, presented an entirely different question than the one in the instant case. The Athol Manufacturing Company made payments
39 from time to time on certain debts of its predecessor which it had assumed and agreed to pay as a consideration for the transfer to it of the predecessor's assets and attempted to take deductions therefor from its income as business expense. There was no question of gain resulting from dicounts or compromises of the debts. So, the Athol Manufacturing Co. case, supra, is not authority for the Board's decision that there was not taxable gain from the petitioner's advantageous purchase of the Sen Sen Chiclet Company's bonds.

The Board has applied the Kirby Lumber Company case, supra, to the purchases by the petitioner of its own bonds, but does not recognize its applicability to the purchases by the petitioner of its

predecessor's bonds. There is no material difference in the subject matter of the two transactions.

In both instances the bonds were the obligations of the petitioner and the assets affected were the petitioner's. The bonds executed by the Sen Sen Chiclet Company had been assumed by the petitioner in consideration of transferred assets. The petitioner stood in the shoes of the Sen Sen Chiclet Company.

It is true that the amounts of the bonds of the Sen Sen Chiclet Company in the first instance constituted part of the cost of the petitioner's assets. So did the bond issued by the petitioner add to the cost of its assets. The advantage to the petitioner was as real, substantial, and material in one case as in the other. It is not apparent why a different principle or rule of law should apply in one case than that applicable to the other.

Wherefore, the respondent renews its motion that the Board reconsider its order and decision heretofore made herein, and
40 modify it, in so far as it relates to the Sen Sen Chiclet Company bonds and hold that the purchases thereof at least than par value resulted in taxable gain.

(Signed) C. M. CHAREST,
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of counsel:
B. M. COON,
Special Attorney,
Bureau of Internal Revenue.

BMC/mer.
3/9/32.

Before United States Board of Tax Appeals

[Title omitted.]

Order denying motion for reconsideration, etc.

The Board having promulgated its opinion in the above-entitled proceeding on May 14, 1931, wherein it was held that the petitioner did not realize income in the year 1924 in the amount of $5,858.61 by virtue of the retirement by petitioner of certain of its own
41 notes at less than the issuing price thereof plus the total deductions for amortization of discount allowable to date of retirement and that the petitioner did not realize income in the years 1922, 1924, and 1925 in the amounts of $26,349.06, $11,397.90, and $15,353.69, respectively, from the retirement, at less than face or par value, of Sen Sen Chiclet Company 6 percent bonds, payment of which was assumed by the petitioner at the time petitioner obtained the assets of the Sen Sen Chiclet Company; the Board having entered its decision in this proceeding on July 29, 1931, setting forth a de-

ficiency of $2,275.11 for the year 1924 and no deficiency and no overpayment for the year 1925; the respondent having filed on December 8, 1931, within the six months' period provided for by statute for the filing of a petition for review, a petition for rehearing wherein it was moved that the Board reverse such holdings set forth above, respondent relying upon the decision of the United States Supreme Court in United States v. Kirby Lumber Company, 284 U.S. 1; hearing having been duly had upon such motion on December 16, 1931, at which time counsel for petitioner conceded that under the decision in United States v. Kirby Lumber Company, supra, petitioner realized a gain of $5,858.61 in 1924 upon the purchase of its own notes and that such amount is taxable income for that year, but denied that it derived taxable income from the retirement of Sen Sen Chiclet Company bonds; the Board having entered an order on January 26, 1932, holding that the petitioner realized taxable income in the amount of $5,858.61 upon the retirement of its own notes but that petitioner did not realize taxable income upon the retirement of bonds of the Sen Sen Chiclet Company; the Board having promulgated its decision on February

42 23, 1932, that for the year 1924 there is a deficiency in tax in the amount of $3,007.44, and that with respect to the year 1925 there is no deficiency; counsel for respondent having filed on March 10, 1932, a "motion for reconsideration and modification of decision" wherein the respondent renews its motion that the Board hold that the retirement by the petitioner of the bonds of the Sen Sen Chiclet Company resulted in taxable gain; now, therefore, the premises having been duly considered, it is

Ordered that such motion be and the same hereby is denied. (See memorandum attached.)

(Signed) STEPHEN J. MCMAHON,
Member.

Entered: July 12, 1932.

Before United States Board of Tax Appeals

[Title omitted.]

Memorandum

The respondent in support of his "motion for reconsideration and modification of decision" which was filed on March 10, 1932,

43 points to the modification of the opinion in New York, Chicago & St. Louis Railway Company, 23 B.T.A. 177, which was relied upon in the instant proceeding. In that case the modification was entered in accordance with a stipulation entered into between the parties to the effect that United States v. Kirby Lumber Co., 284 U.S. 1, required a holding that the taxpayer in 1917 had a gain of $16,958.34 from the purchase of its bonds for less than par. In the instant proceeding that modification which was made in that

proceeding in accordance with the stipulation of those parties, is not binding; and in the instant proceeding the principle that the Sen Sen Chiclet Company bonds were assumed by the petitioner as a part of the purchase price of the assets of the Sen Sen Chiclet Company, and that whatever petitioner is required to pay to retire the Sen Sen Chiclet Company bonds constitutes a part of the cost to the petitioner of the Sen Sen Chiclet Company assets is adhered to. The principle relied upon here is that enunciated in Athol Manufacturing Co., 22 B.T.A. 105, affirmed 54 Fed. (2d) 230, wherein it is stated in part as follows:

"The petitioner further contends that it is entitled to deduct certain amounts paid out by it in 1923 and 1924 upon the obligations of the old company. Since, however, the petitioner assumed these obligations of the old company as part consideration for the purchase of its assets, it is apparent that the amounts paid out upon such obligations are a part of the cost to the petitioner of the assets and constitute capital rather than business items, as the respondent has determined. * * * *"

44 It is held that the petitioner derived no income in 1922, 1924, and 1925 from the purchase of the Sen Sen Chiclet Company bonds.

(Signed) STEPHEN J. MCMAHON,
Member.

In United States Circuit Court of Appeals, Second Circuit

[Title omitted.]

Petition for Review and Assignment of Error

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes David Burnet, Commissioner of Internal Revenue, by his attorneys, G. A. Youngquist, Assistant Attorney General, C. M. Charest, general counsel, Bureau of Internal Revenue, and Byron M. Coon, special attorney, Bureau of Internal Revenue, and resepectfully shows:

I

45 The petitioner on review is the duly appointed and qualified Commissioner of Internal Revenue, holding his office by virtue of the laws of the United States. The respondent on review, the taxpayer, is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey having its principal office in Long Island City, New York; that it filed its corporate income and profits tax returns for the calendar years 1924 and 1925 with the Collector of Internal Revenue in the First Collection District of New York, whose office is located within the jurisdiction of the United States Circuit Court of Appeals for the Second Circuit.

II

The Commissioner of Internal Revenue determined deficiencies in income taxes for the calendar years 1924 and 1925 in the amounts of $19,419.17 and $8,674.90, respectively, and on May 26, 1927, in accordance with the provisions of subdivision (a) of section 274 of the Revenue Act of 1926, sent the respondent herein by registered mail a notice of said deficiencies. Thereafter the taxpayer appealed said notice of deficiency to the United States Board of Tax Appeals, and said appeal bears docket number 29897. On May 14, 1931, the Board promulgated its interlocutory decision containing its findings of facts and opinion, reported in 23 B.T.A. 221. On July 29, 1931, the Board entered its order of redetermination, wherein it ordered and decided that there was a deficiency of $2,275.11 for the year 1924 and no deficiency and no overpayment for the year 1925. On December 8, 1931, within the six-months period provided for by statute for the filing of a petition for review, a petition for rehearing was filed by the Commissioner and heard on December 16, 1931, at
46 which hearing the taxpayer conceded the taxability of its gain derived from the purchase for retirement of its own notes at less than the issuing price, but continued to deny the taxability of similar gains from its predecessor's bonds which it had assumed. On January 26, 1932, the Board entered its order holding that the taxpayer realized taxable income in the amount of $5,858.61 upon the retirement of its own notes, but that the taxpayer did not realize taxable income upon the retirement of the bonds of its predecessor company; and on February 23, 1932, the Board promulgated its decision that there was a deficiency in the amount of $3,007.44 for the year 1924, and that with respect to the year 1925 there was no deficiency.

On March 10, 1932, the Commissioner filed a motion for reconsideration and modification of the Board's decision, and on July 16, 1932, the Board made and entered its memorandum opinion and order denying the said motion.

The tax liability of the respondent for the years 1921, 1922, and 1923 were not before the Board for redetermination, but the Board was concerned with any net losses sustained by the respondent in those years insofar as they affected its tax liability for the year 1924.

The question in the case is whether the Commissioner erred in including in the taxpayer's income for the years 1922, 1924, and 1925 as taxable gain the excess of the face or par value over the purchase price of certain bonds of the Sen Sen Chiclet Company which the taxpayer assumed and agreed to pay when it acquired the assets of the Chiclet Company, which bonds were purchased for retirement in several transactions during those years.

47 In 1909 the Sen Sen Chiclet Company, a Maine corporation, issued $2,700,000 face value of bonds maturing May 14, 1929,

with a sinking-fund clause providing for a deposit with the trustee of $50,000 a year to provide for the purchase of bonds submitted to the trustee in open bid by bondholders under the terms of the indenture. In August 1914 the respondent acquired all of the assets of the Sen Sen Chiclet Company and assumed the payment of its liabilities, among which was $2,425,000 par value of bonds then outstanding and unredeemed. Thereafter the respondent purchased from the public Sen Sen Chiclet bonds and paid therefor as follows:

In 1922, $82,000 par value for $55,650.94, thereby saving $26,349.06, of which $16,787.50 was reported as income by the taxpayer and the entire amount included in the taxable income by the Commissioner.

In 1923, $62,500.00 par value bonds for $47,240.58, thereby saving $14,259.42, which was reported by the taxpayer and included therein by the Commissioner.

In 1924, $57,000 par value Sen Sen Chiclet Company bonds for $47,602.10, thereby saving $11,397.90, which was reported by the taxpayer as income and included therein by the Commissioner.

In 1925, $201,500 par value bonds for $186,146.31, thereby saving $15,353.69, which was reported as income by the taxpayer and included in income by the Commissioner.

The Board excluded all of said items from income.

The petitioner charged the respondent herein with income in 1922, 1924, and 1925 in the amounts of $26,349.06, $11,397.90, and $15,353.69, representing in each instance the amount by
48 which the face or par value of the Sen Sen Chiclet Company bonds purchased for retirement during the year exceeded the purchase price paid by the petitioner. The bonds in question were a part of the bonds of the Sen Sen Chiclet Company outstanding at the date of the purchase of that company's assets by the respondent, payment of which was assumed by the respondent as part of the purchase price of these assets.

The Board reasoned that although potentially the liability created by the respondent in assuming the payment of the bonds was equal to their aggregate face or par value, yet actually its liability to the Sen Sen Chiclet Company was not for any specific sum, but rather one which could be satisfied by whatever amount the respondent might be required to pay in acquiring the bonds for retirement. Therefore, it appeared to the Board that there was not in the case a matter of the respondent's satisfaction of an obligation for less than the full amount or face value thereof, but rather that whatever amounts the respondent paid to acquire the bonds for retirement constituted items of cost of the assets of the Sen Sen Chiclet Company, and the amounts the respondent avoided payment of in acquiring said Sen Sen Chiclet Company's bonds at less than par did not constitute taxable gain.

Accordingly, the Board held that the petitioner erred in including in income for the years 1922, 1924, and 1925 the said amounts of

$26,349.06, $11,397.90, and $15,353.69, respectively, on account of the purchase of said bonds and notes, and that the net incomes of the respondent herein for the years 1924 and 1925 as determined by the petitioner in the deficiency notices should be reduced by the amounts of $11,397.90 and $15,353.69, respectively.

49

III

Your petitioner further shows that he is aggrieved by the action of the said Board and injured thereby and that the errors complained of are as follows:

1. The Board of Tax Appeals erred in deciding and determining that the Commissioner erred in including in income for the year 1922, 1924, and 1925, respectively, the amounts of $26,349.06, $11,397.80, and $15,353.69, respectively.

2. The Board of Tax Appeals erred in deciding and determining that the difference between the par or face value of the said Sen Sen Chiclet Company bonds and the cost of acquisition for retirement was not taxable gain.

3. The Board of Tax Appeals erred in refusing to increase the taxpayer's income for the years 1922, 1924, and 1925, in the amounts of $26,349.06, $11,397.90, and $15,353.69, respectively.

4. The Board of Tax Appeals erred in refusing to reverse and modify its holding that the said difference between the par value and the purchasing price of the said Sen Sen Chiclet bonds was not taxable income.

5. The Board of Tax Appeals erred in holding and deciding that the said differences and gains in the purchase of the said Sen Sen Chiclet Company's bonds for retirement did not constitute a part of the cost to the taxpayer of the Sen Sen Chiclet Company assets.

Wherefore, the Commissioner petitions that the decisions and orders of the Board of Tax Appeals be reviewed by the United

50 States Circuit Court of Appeals for the Second Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said court and transmitted to the clerk of the said court for filing and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by the said court.

G. A. YOUNGQUIST,
Assistant Attorney General.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of counsel:
BYRON M. COON,
Special Attorney,
Bureau of Internal Revenue.

(Verified by C. M. Charest on August 19, 1932.)

51 In United States Circuit Court of Appeals

[Title omitted.]

Notice of filing petition for review

To: AMERICAN CHICLE COMPANY,
Long Island City, New York.
PAUL L. PEYTON,
% BREED, ABBOTT & MORGAN,
15 Broad Street, New York, N.Y.

You are hereby notified that the Commissioner of Internal Revenue did, on the 19th day of August 1932, file with the clerk of the United States Board of Tax Appeals, at Washington, D.C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review
52 and the assignments of error as filed is hereto attached and served upon you.

Dated this 19th day of August 1932.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 22 day of August 1932.

(Sgd.) AMERICAN CHICLE CO.,
A. A. MASTERSON,
Respondent on Review.

(Sgd.) PAUL L. PEYTON,
Attorney for Respondent on Review.

53 In United States Circuit Court of Appeals

[Title omitted.]

Praecipe for record

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board.

(a) Petition, including annexed copy of deficiency letter.
(b) Answer.

(c) Amendment to answer.

(d) Petition for rehearing filed December 8, 1931.

54 (e) Motion for reconsideration filed March 10, 1932.

3. Findings of fact, opinion and decision of the Board.

(a) Order entered January 26, 1932, decision entered Feb. 23, 1932.

(b) Memorandum decision entered July 12, 1932.

4. Notice of hearing of petition for rehearing.

5. Petition for review, together with proof of service of notice of filing petition for review and of service of copy of petition for review.

6. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record.

7. This praecipe.

(Signed) C. M. CHAREST.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 19th day of November 1932.

PAUL L. PEYTON,
Attorney for Respondent.

55 [Clerk's certificate to foregoing transcript omitted in printing.]

56 In United States Circuit Court of Appeals for the Second Circuit

No. 380. October Term, 1932

Argued April 21, 1933. Decided May 8, 1933

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

AMERICAN CHICLE COMPANY, RESPONDENT

Appeal from the United States Board of Tax Appeals.

Before L. HAND, SWAN, and CHASE, Circuit Judges.

Appeal by the Commissioner of Internal Revenue from an order of the Board of Tax Appeals expunging in part a deficiency assessed against the American Chicle Company.

William Cutler Thompson, of Washington, D.C., for petitioner.

Paul L. Peyton, of Bronxville, N.Y., for respondent.

Opinion

PER CURIAM:

The question presented by this appeal arises as follows: In 1914 the taxpayer, which keeps its books on an accrual basis, bought all the

assets of another company, and assumed its debts. These included an issue of bonds which provided for an annual amortization by purchase in the market. In the years 1924 and 1925, the taxpayer, in accordance with its obligation bought a number of these bonds at less than their face and so retired them. The Commissioner charged it, as present income, with the difference between the face of these bonds and the amount at which they were bought. The taxpayer appealed, the Board expunged this part of the deficiency, and the Commissioner in turn appealed to this court.

The question depends for its answer upon the scope of the decision of the Supreme Court in United States v. Kirby Lumber Co., 284 U.S. 1, 52 S.Ct. 4, 76 L.Ed. 131, where it was held that such a profit was income, in a case where the bonds had been issued by the taxpayer for money, and been bought and retired in the same year. The first circuit in Commissioner v. Coastwise Transportation Co. (C.C.A.) 62 F. (2d) 332, extended the doctrine to a case where the taxpayer had bought a fleet of ships, for which it gave in part payment a series of notes secured by a mortgage on the fleet. Some of these it retired at less than par. Later it refunded the notes by a bond issue, some of which it also retired at less than par. As to both it was charged with the difference as income. These are the only decisions in the courts which have dealt with the question. However, since 1921 the Commissioner's regulations (now article 545, Regulations 69), have provided that although, "if bonds are issued * * * at their face value, the corporation realizes no gain or loss", it does so upon their retirement at less than their "face value." This was the regulation approved in United States v. Kirby Lumber Company. Athol Mfg. Co. v. Com'r., 54 F. (2d) 230 (C.C.A. 1), and Commissioner of Internal Revenue v. Rail Joint Co., 61 F. (2d) 751 (C.C.A. 2), do not touch the question at bar at all.

We can see no difference between bonds retired in the same year and later; nor between those issued in payment for property, and an existing mortgage assumed by the buyer when the property is transferred. But the distinction does seem to us critical between obligations whose consideration is money, and those issued or assumed for property which the obligor still holds. Every increase in the value of property might indeed be treated as a "gain", though
57 that would involve appraising taxpayers' property each year; but such is not the notion underlying our system of taxation. The gain must be "realized", either by a sale of the property for money, or by its exchange for something else. Section 935, title 26, U.S. Code (26 U.S.C.A. § 935). When a taxpayer gets money by issuing an obligation which he later discharges for less than its face, the transaction is completed, because money need not be sold or exchanged to be "realized." So we read United States v. Kirby Lumber Co., supra, 284 U.S. 1, 52 S.Ct. 4, 76 L.Ed. 131. But if he buys property by an obligation in the form of a bond, note, or the like, and if it remains in kind after the debt is paid, there can be no

"gain." The cost has indeed been definitively settled, but that is only one term of the equation; as long as the other remains at large, there is no "realized" gain.

Order affirmed.

58 In United States Circuit Court of Appeals, Second Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

AMERICAN CHICLE COMPANY, RESPONDENT

Judgment

Filed May 15, 1933

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, affirmed.

It is further ordered that a mandate issue to the said Board in accordance with this decree.

WM. PARKIN, *Clerk.*

59 [File endorsement omitted.]

60 [Clerk's certificate to foregoing transcript omitted in printing.]

61 Supreme Court of the United States

Order allowing certiorari

Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File No. 37,952. U.S. Circuit Court of Appeals, Second Circuit. Term No. 349. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. American Chicle Company. Petition for a writ of certiorari and exhibit thereto. Filed August 15, 1933. File No. 349 O.T. 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933